

**STATE OF CONNECTICUT
BEFORE THE COMMISSIONER OF CONSUMER PROTECTION**

In the Matter of:

Docket No: 2013-428

Marcus Dairy, Inc.
4 Eagle Rd.
Danbury, CT 06810

ASSURANCE OF VOLUNTARY COMPLIANCE

This Assurance of Voluntary Compliance to William M. Rubenstein, Commissioner of the Department of Consumer Protection of the State of Connecticut (the "Department"), by Marcus Dairy, Inc., "Marcus," shall not be considered an admission or finding of violation for any purpose, and is made pursuant to Connecticut General Statutes, Section 42-110j.

Marcus is a domestic corporation located in Danbury, Connecticut. As a dairy wholesaler, Marcus sells a variety of products, including half-pints of milk used by school districts in their school food programs. School milk contracts are sometimes awarded through a competitive bidding process in which dairies submit, when requested, both a firm price bid and/or a fluctuating price bid. The school district will then select a dairy as its provider and enter into either a firm price or fluctuating price contract. For firm price contracts, the price of each product remains the same for each month of the school year. For fluctuating price contracts, the price of milk rises or falls on a monthly basis, typically in accordance with a federally established minimum price for Class I fluid milk.

Pursuant to its statutory authority, the Department of Consumer Protection initiated an investigation into whether a violation of Section 42-110b of the Connecticut General Statutes had occurred by Marcus Dairy by charging more on fluctuating price contracts with school districts than would be warranted by the price set by the Federal Milk Market Administrator pursuant to the terms of each school district's contract.

The Department's investigation found the following facts:

The U.S. Department of Agriculture (USDA) oversees the pricing of milk in order to ensure that dairy farmers are guaranteed a minimum price for their product. Each month, USDA Federal Milk Market Administrators around the country issue regional Federal Milk Marketing Orders (FMMO), which list the minimum price for different classes of milk, including Class I fluid drinking milk. The monthly FMMO announces a Class I milk price

at 3.5% butterfat, as well as separate minimum prices for skim milk and butterfat, two of the components of Class I milk.

Since approximately 1960, Marcus has used the same methodology for computing the price of school milk in fulfilling fluctuating price contracts. Each month, Marcus takes the FMMO Class I milk price at 3.5% butterfat and calculates the change in price from the previous month's FMMO. This change in price is then applied to the last invoiced price for any given fluctuating price contract. For example, if Marcus charged a school \$0.19 per half-pint of milk in May, and the FMMO difference from May to June was an increase of \$.01, Marcus would charge the school \$.20 per half-pint in June. Marcus applies this pricing methodology to all Class I milk products it sells to school districts under fluctuating price contracts, making no distinction between types of milk (e.g. flavored, whole, skim). As a result, the same price change is applied across the board.

According to the New England Federal Milk Market Administrator, on or about the year 2000, component pricing was introduced and the "butterfat differential" was dropped resulting in a change in practice by the Market Administrator as to how to calculate the change in the producer pay price from month to month. Prior to 2000, dairies would use the previously described method based on the 3.5% butterfat price (the "butterfat differential"); post-2000, fluctuating prices began to be determined through a methodology that is commonly referred to as "component pricing".

As a methodology, component pricing relies upon the FMMO's announced minimum prices for two of the components that make up Class I milk: butterfat and skim milk. Instead of using a 3.5% butterfat content for all milk products, the component pricing methodology involves determining the ratio of butterfat to skim milk for each different milk product. To do the calculation, the minimum butterfat and skim milk prices are entered into the Milk Market Administrator's Class I Retail Price Conversion Template spreadsheet which became available in approximately 2002 at the request of various retailers seeking clarification of the Market Administrator's change. Based on formulas set by the Milk Market Administrator, the spreadsheet then generates prices for various size containers, as well as various types of milk, including whole, 2%, 1%, 0.5%, skim and flavored. As a result of the different ratios of butterfat to skim milk for different milk products, the monthly fluctuation in price is almost always different for each milk product.

Upon reviewing bidding instructions for all of the Marcus contracts with school districts since 2007, the Department found minimal instructions from the schools to dairies on how to calculate fluctuating price changes. Some bidding instructions were silent on fluctuating prices, however many districts used the following language:

Bidders are requested to quote a variable price, which may be increased or decreased to reflect any change in price as authorized in the wholesale price of milk by the Federal Milk Market Administrator for Class 1, milk in Federal Order #1.

The Department interprets the above instructions to require component pricing, especially in light of the post-2000 shift to component pricing. Consequently, the Department

reviewed all of Marcus's invoices to school districts since 2007 and independently calculated the monthly price fluctuations under a component pricing methodology.

The Department's analysis yielded results showing a differential in seven of the ten school districts analyzed.

Marcus does not admit or agree, nor has the Department made a finding, that facts found in the Department's investigation establish that the dairy violated Section 42-110b by not using the component pricing method in its contracts with school districts. Marcus contends that its traditional methodology is countenanced by the school districts' contractual language, some of which has been in effect since before the change in the FMMO pricing methodology in 2000. Marcus asserts that it would have used the component pricing method if requested by a school district or specified in a contract after 2000. In order to avoid protracted proceedings, or a judicial determination of applying component pricing to completed contracts, Marcus enters into this Assurance of Voluntary Compliance.

Upon the date of signing this Assurance of Voluntary Compliance, Marcus agrees to:

- 1) Unless explicitly and expressly prohibited by the terms of a contract or directed otherwise by a school district in writing, utilize the component pricing methodology for assessing fluctuating milk prices, which means that adjustments will be made for the relevant ratio of butterfat to skim milk for each type of milk product unless and until a new methodology is prescribed by the Market Administrator.
- 2) In accordance with the Department's determination of the difference in pricing charged under Marcus' traditional methodology (the "butterfat differential") and the price that would have been charged under component pricing methodology over the past 5 years, provide voluntary contributions within 30 days, to the following school districts in the following amounts:
 - a. New Canaan: \$751.22
 - b. New Milford: \$2,875.00
 - c. Prospect: \$327.59
 - d. Region 12: \$92.73
 - e. Regions 14 & 15: \$9,916.50
 - f. Seymour: \$3,102.16
 - g. Trumbull: \$6,487.94


The payments under this paragraph shall be by check payable to the school district, which checks shall be delivered to the Department for distribution to each school district.

- 3) Make a ten thousand dollar (\$10,000.00) gift to the Department of Consumer Protection for purposes of furthering consumer education and consumer complaint resolution initiatives. Said amount shall be by check or money order made payable to "The Department of Consumer Protection" which shall be deposited into the Consumer Protection Settlement

Account # 30248 for the Department's consumer complaint resolution programs, consumer education, or consumer protection enforcement and litigation. Said payment shall be due at time of signing this Assurance of Voluntary Compliance. This is not a penalty or fine.


Dated: 8/1

MARCUS DAIRY, INC.

By: 
William A. Fitchett, Vice-President
Duly Authorized

William A. Fitchett
(Printed name of person signing this agreement)

Accepted and approved this agreement this 6 day of August 2013.


William M. Rubenstein
Commissioner of Consumer Protection